STATE OF MICHIGAN

COURT OF APPEALS

MEIJER, INC., Petitioner-Appellant/Cross-Appellee,	UNPUBLISHED March 24, 2005
v	No. 252660 Tax Tribunal
CITY OF MIDLAND, Respondent-Appellee/Cross-Appellant.	LC No. 00-190704

Before: Hoekstra, P.J., Whitbeck, C.J., and Neff, J.

Whitbeck, C.J. (concurring in part and dissenting in part).

I concur in the majority's conclusions that (1) the question of the Tax Tribunal's use of replacement, rather than reproduction cost, is not properly before us and (2) the Tax Tribunal did not exceed its scope of authority on remand by deducting a five-percent developer's fee from the property's valuation. It is with the majority's conclusion that in that same remand "the Tax Tribunal carried out this Court's instruction to it [in *Meijer 1*[1]] and arrived at a logically consistent conclusion" that I respectfully disagree.

I. The Tax Tribunal's Decision On Remand

The majority cuts to the core of this issue when it states that on remand, "the Tax Tribunal searched the record [in the original case that led to the appeal in *Meijer 1*] and concluded that the answer [to the question this Court posed in *Meijer 1* of how much functional obsolescence exists at the property due to modification costs] was zero." I do not agree that this was the conclusion that the Tax Tribunal reached on remand. Rather, the Tax Tribunal stated that:

- Meijer "failed to move forward with credible and competent evidence in order for the Tribunal to make an independent determination of a legally supportable specific cost to modify [Meijer's] appraiser's replacement cost."

[1] *Meijer, Inc. v City of Midland*, 240 Mich App; 610 NW2d 242 (2000).

- Meijer "has not persuaded the Tribunal, through testimony or substantiated evidence, that there was any further functional obsolescence that had not been accounted for by the use of its replacement cost approach."
- Its "original determination that there was no evidentiary support or testimony to support a further reduction of value for functional obsolescence over and above that already recognized in [Meijer's] replacement cost model. . . ."

Rather obviously, the Tax Tribunal's third "finding"[2] is not a finding at all; that "finding" is not a complete sentence and lacks any wording describing its effect. It is fair to say, however, that when read together the Tax Tribunal's three statements amount to a determination that, based on the *original* record before it, there was no competent, material and substantial evidence in *that* record to support any further adjustment in the assessed value of the property for functional obsolescence.

Respectfully, I suggest that this is *not*, as the majority holds, a decision on remand that the answer to the question of how much functional obsolescence exists at the property due to modification costs is "zero." The Tax Tribunal made no such decision. Rather, it decided on remand that there was no competent, material and substantial evidence in the original record to support any further adjustment in the assessed value of the property for functional obsolescence. It follows, I believe, that the Tax Tribunal's actual decision on remand necessarily implicates the law of the case doctrine. The question then becomes: what did this Court hold in *Meijer 1* and what, exactly, is the law of the case?

II. The Holdings In *Meijer 1* And The Law Of The Case

In *Meijer 1*, this Court made the following statements:

- Meijer "first argues that the Tax Tribunal committed legal error in determining the true cash value of [Meijer's] property under the replacement cost approach when it failed to include a deduction for functional obsolescence due to the cost of modifying the buildings for use by another retailer if the buildings were lease or sold. *We agree*."[3]
- "[O]bsolescence should be calculated as a percentage of the building cost only and not the building and land together as [Meijer] attempted to do. *However, the tribunal erred in failing to make its own determination of the functional obsolescence due to modification costs.*"[4]

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[2] This sentence fragment is contained under that Tax Tribunal's conclusions of law, but the Tribunal nonetheless specifically used the term "finding."

[3] *Meijer 1*, *supra* at 5-6; emphasis supplied.

[4] *Id.* at 7; emphasis supplied.

- "The Tax Tribunal specifically found that 'the subject property includes improvements that have utility only to [Meijer] and that a typical buyer in the market place would incur considerable modification costs.' *This is the type of functional obsolescence that is not eliminated by adoption of the replacement cost approach.*"[5]
- "The cost of these modifications [to signs, facades, truck bays, interior layouts, and other features] must be deducted from the replacement cost in order to determine the true cash value of the property. If a buyer could build an equivalent building for an amount equal to the replacement cost, *that buyer would not buy a building needing substantial modification unless the selling price were lower than or equal to the replacement cost less the cost to modify the property.*"[6]
- "Once the Tax Tribunal found that a typical buyer in the market place would incur considerable modification costs, *it was not free to wholly reject [Meijer's] claim for functional obsolescence.* While the Tax Tribunal is not required to accept valuations advanced by the taxpayer or the assessing unit, *it remains the duty of the tribunal to adopt a valuation that is 'most appropriate to the individual case as the particular facts may indicate.'*[7]
- "Therefore, we remand to the Tax Tribunal to make an independent determination of *how much* functional obsolescence exists due to modification costs."[8]

III. Mistakes And Misunderstandings

The City of Midland argues here that the panel in *Meijer 1* "*mistakenly* concluded as a matter fact that there was competent, material and substantial evidence in the record from which it could have, although it chose not to, make a finding as to the amount of costs which would be anticipated by a typical purchaser."[9] The City goes on to state, "*This misunderstanding* by the Court of Appeals was the premise upon which it based both its Opinion and its directions on remand with respect to functional obsolescence."[10]

It may well be that the panel in *Meijer 1* was mistaken when it made the statements that I have quoted above. However, these statements establish—and in my view indisputably

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[5] *Id.;* emphasis supplied.

[6] *Id.* at 7-8; emphasis supplied.

[7] *Id.* at 8, citing *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (1985); emphasis supplied.

[8] *Id.*; emphasis supplied.

[9] Emphasis supplied.

[10] Emphasis supplied.

establish—that the *Meijer 1* panel agreed that the Tax Tribunal committed legal error in determining the true cash value of Meijer's property under the replacement cost approach by failing to include a deduction for functional obsolescence. That panel also concluded that the Tax Tribunal erred in failing to make its own determination of the functional obsolescence due to modification costs. That panel finally concluded that the Tax Tribunal was not free to wholly reject Meijer's claim for functional obsolescence and that, while the Tribunal was not required to accept valuations advanced by Meijer or the City, it remained the Tribunal's duty to adopt a valuation that is "most appropriate to the individual case as the particular facts may indicate." *Meijer 1* was a published case and it is precedential.[11] This Court and the Tax Tribunal are therefore bound by it.

It may further be that a "misunderstanding" by the *Meijer 1* panel led to a "faulty premise" when that panel remanded for an independent determination by the Tax Tribunal of "how much" functional obsolescence existed at the property due to modification. But the remedy for such mistakes and misunderstandings, if they existed, was not to ignore them. Rather, the remedy was either to seek reconsideration or to apply to the Supreme Court for leave appeal. The City did not do the former. It did do the latter, but the Supreme Court denied its application. To belabor the point, the holdings in *Meijer* 1 are therefore the law of the case as far as this panel and the Tax Tribunal are concerned and neither we nor the Tax Tribunal are at liberty to ignore them.

In the same vein, the remedy is not for *this* panel to, as the City suggests, review this matter with the "correct facts" in hand. Fortunately, the majority here has not adopted the City's suggestions. Unfortunately, however, the majority has adopted an approach that leads to the same result. Instead of substituting the City's version of the "correct facts," the majority reads words into the Tax Tribunal's decision on remand that simply are not there. The Tax Tribunal did *not* decide that the amount of functional obsolescence at the property due to modification costs is "zero;" that word does not appear in the Tribunal's decision on remand. What the Tribunal *did* decide was that there was no competent, material and substantial evidence in the original record to support any further adjustment in the assessed value of the property for functional obsolescence.

IV. The Effect Of The Law Of The Case

In my view, this decision of the Tax Tribunal is directly contrary to the holdings of the panel in *Meijer 1* and, therefore, the law of the case. As I outlined above, the panel in *Meijer 1* (1) agreed that Tribunal committed legal error in determining the true cash value of Meijer's property under the replacement cost approach by failing to include a deduction for functional obsolescence, (2) concluded that the Tax Tribunal erred in failing to make its own determination of the functional obsolescence due to modification costs, (3) concluded that the Tax Tribunal was not free to wholly reject Meijer's claim for functional obsolescence and that it remained the Tribunal's duty to adopt a valuation that is "most appropriate to the individual case as the

[11] See MCR 7.215(C)(2).

particular facts may indicate," and (4) remanded for the Tribunal's independent determination of "how much" functional obsolescence existed at the property due to modification.

I think it inescapably follows that, under the law of the case doctrine, these decisions of the *Meijer 1* panel bound the Tax Tribunal on remand. The Tribunal's decision on remand may have been, as the majority puts it, "logically consistent." Nonetheless, the Tribunal did not follow the law of the case and it did not carry out this Court's instructions. Rather, it circumvented those instructions. This was an error of law. I would therefore reverse and remand with instructions to the Tribunal to make a finding as to how much, if any, functional obsolescence existed at the property due to modifications.

In my view, this will of necessity require an evidentiary hearing at which both Meijer and the City may present evidence on this issue. I reach this conclusion because the Tax Tribunal on remand in *Meijer 1* found that Meijer had presented no credible and competent evidence on the existence of functional obsolescence at the property. If this is the case and if it is also the case that the panel in *Meijer 1* found that functional obsolescence did exist, then manifestly, a further hearing is required. While this may in fact give Meijer, as well as the City, two bites at this particular apple, I can see no other approach that comports with this Court's decision in *Meijer 1*.

/s/ William C. Whitbeck